CHEUNG YING-LUN

v.

GOVERNMENT OF AUSTRALIA & ANOR.

COURT OF APPEAL, HONG KONG
LORD BRIDGE OF HARWICH
LORD TEMPLEMAN
LORD ACKNER
[CIVIL APPEAL NO. 74 OF 1990]
4 OCTOBER 1990

CRIMINAL PROCEDURE: *Magistrate ordered committal on prima facie basis - Provision which provides two standards of proof in the alternative - Lower or higher - Armah's case per Lord Reid - Section 85(2) Hong Kong Magistrates' Ordinance.*

The petitioner, C, was committed to custody pursuant to the Fugitive Offenders (Hong Kong) Order 1967 for offences which he was alleged to have committed in Australia. C then applied for an order of *habeas corpus* which was refused by the Court of Appeal. C now petitions for special leave to appeal against the Court of Appeal decision.

The issue for determination is whether the Magistrate, who concluded on the totality of the evidence that there was a *prima facie* case which was sufficient to warrant committing him in custody was right in making this order on the footing that the appropriate standard of proof which the evidence is required to attain is that of a *prima facie* case.

Held:

[1] In the light of the decision of the House of Lords in *Armah's* case, the two phrases in s. 85(2) of the Hong Kong Magistrates' Ordinance, that is:

(i) "sufficient to put the accused upon his trial"; and

(ii) "raises a strong or probable presumption of the guilt of the accused" stipulate different standards of proof; (i) is a lower standard than (ii)

[2] The two phrases have a very long history in English legislation, but the solution to the problem as to how a section containing the two phrases in the alternative is to be construed is clearly provided by Lord Reid in *Armah's* case at pp. 225 and 226 and is clear authority establishing that it is sufficient to justify the committal to which the section relates that the lower standard of proof should be satisfied.

[Petition dismissed.]

Case referred to:
R. v. Governor of Brixton Prison, ex parte Armah [1968] AC 192

Legislation referred to:
Fugitive Offenders Act 1885 [UK], s. 5
Fugitive Offenders (Hong Kong) Order 1967 [HK], s. 7(4)
Magistrates Ordinance [HK], ss. 85, (2)
Indictable Offences Act 1948 [UK], s. 25

JUDGMENT

Lord Bridge of Harwich:

This is a petition for special leave to appeal against a decision of the Court of Appeal of Hong Kong dismissing an appeal from a decision of Chief Justice Yang who refused an application by the petitioner for an order of *habeas corpus* following his committal to custody pursuant to the Fugitive Offenders (Hong Kong) Order 1967 in respect of offences which he is alleged to have committed in Australia.

It is exceptional for their Lordships to deliver a reasoned judgment in disposing of a petition for leave to appeal, but it is desirable to do so in this case because the law requires clarification.

The facts do not matter. The sole issue is this. The Magistrate who heard the proceedings, whereby the Government of Australia sought the return of this petitioner under the Fugitive Offenders (Hong Kong) Order, concluded on the totality of the evidence that there was a *prima facie* case which was sufficient to warrant committing him in custody. The question raised is whether, having reached that conclusion, he was right to make the order on the footing that the appropriate standard of proof which the evidence is required to attain is that of a *prima facie* case.

The matter arises in this way. Section 7(4) of the Schedule to the Fugitive Offenders (Hong Kong) Order provides as follows:

> (4) Where an authority to proceed has been issued in respect of the person arrested and the Court of committal is satisfied, after hearing any evidence tendered in support of the request for the return of that person or on behalf of that person, that the offence to which the authority relates is a relevant offence and is further satisfied:
>
> (a) where that person is accused of the offence, that the evidence would be sufficient to warrant his trial for that offence if it had been committed within the jurisdiction of the Court;
>
> (b) ... the Court shall .... commit him to custody.

That provision impliedly refers to the provisions of s. 85 of the Hong Kong Magistrates Ordinance which sets out the circumstances in which a Magistrates' Court may properly commit a person for trial accused of an offence "within the jurisdiction of the Court". The relevant provision in s. 85(2) of the Magistrate Ordinance is in the following terms:

> If in the opinion of the Magistrate after hearing such evidence as aforesaid and taking into consideration any statement of the accused, such evidence is sufficient to put the accused upon his trial for an indictable offence, or, if the evidence given raises a strong or probable presumption of the guilt of the accused, then the magistrate shall order that the accused stand committed for trial at the High Court.

It is quite clear, in the light of the decision of the House of Lord in *R. v. Governor of Brixton Prison, ex parte Armah* [1968] AC 192, that the two phrases in s. 85(2) "sufficient to put the accused upon his trial" and "raises a strong or probable presumption of the guilt of the accused" stipulate different standards of proof. The question arises here: given that the two standards are stated in the alternative, which standard is applicable? The first is the lower standard, and, as the case of *Armah* establishes, where a provision, such as used to be found in the English Fugitive Offenders Act 1885, s. 5, requires for the committal of a fugitive that the standard of a strong or probable presumption of guilt be satisfied, that is a higher standard than the standard of a *prima facie* case.

Mr. McCoy, who presented the case for the petitioner most attractively, submits here that it is the higher standard which must be satisfied to justify committing the fugitive under the Hong Kong Order and, since the Magistrate indicated only that he was satisfied that a *prima facie* case had been made out, that was insufficient.

It is puzzling of find a section which prescribes two standards in the alternative, a lower and then a higher, for if the lower standard of proof is satisfied, one may ask rhetorically what purpose is served by providing, in the alternative, that a higher standard will also suffice to justify committal. The two phrases have a very long history in English legislation, but the solution to the problem as to how a section containing the two phrases in the alternative is to be construed is clearly provided by a passage in the speech of Lord Reid in the case of *Armah*, to which their Lordships have already referred, at pp. 225 to 226. Reviewing the history of these provisions, Lord Reid came to a provision in s. 25 of the Indictable Offences Act 1948, from which he quoted in the following terms:

> ....if, in the opinion of such justice or justices, such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given raises a strong or probable presumption of the guilt of such accused party, then the justices are to commit him to prison.

Lord Reid continued:

> In my view this section, though using different words, was clearly referring to the two different standards set out in the Act of 1826; in effect it provided that even if the evidence only came up to the lower standard set out in the Act of 1826 the accused should be committed to prison.

So, whatever be the historical explanation for this apparently anomalous inclusion in a single section of the two standards of proof, the lower and the higher, that passage in Lord Reid's, speech is, in their Lordships' opinion, clear authority establishing that it is sufficient to justify the committal to which the section relates that the lower standard of proof should be satisfied.

For those reasons, their Lordships will humbly advise Her Majesty that this petition should be dismissed.

Also found at [1990] 2 CLJ 911